

MORGOS (Migration) [2018] AATA 2227 (1 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr John Morgas
VISA APPLICANT:	Mrs Thi Trinh Le
CASE NUMBER:	1700056
DIBP REFERENCE(S):	OSF2016/038954
MEMBER:	Russell Matheson
DATE:	1 June 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 01 June 2018 at 12:20pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 309 (Spouse (Provisional)) – Whether there is a genuine and continuing relationship – Quick inception of the relationship – Money transfers – Little knowledge of each other's financial circumstances – Trip to Vietnam – Short term stay in a hotel – Limited social activities together – Inconsistent evidence – Conflicting recollection of the wedding and other events – Decision under review affirmed

LEGISLATION

Migration Act 1958 ss 65, 359AA

Migration Regulations 1994 Schedule 2 cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 2 December 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a 60 year old female national of Vietnam. She applied for the visa on 2 June 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 Partner (Provisional). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211(2).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the applicant was the spouse of the sponsor.
4. The sponsor (review applicant) appeared before the Tribunal on 15 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
7. The Tribunal has before it the Department of Immigration (Department) file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor (review applicant) to the Tribunal.
8. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record. _

Whether the parties are in a spousal or de facto relationship

9. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This

includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered in Vietnam on 18 May 2016. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

12. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is not satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
13. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department and Tribunal file due regard.

14. Financial aspects

15. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
16. The sponsor told the Tribunal that he sends the applicant \$160 per month by way of money transfer. The sponsor provided as evidence money transfer receipts at the Tribunal hearing for the period from 17 November 2016 to 22 February 2018 totalling \$2,955. The Tribunal accepts that the sponsor has been supporting the applicant financially post their wedding date in February 2016. The parties told the Tribunal that the sponsor paid \$5,000 and the applicant paid \$2,000 towards the visa application. The Tribunal accepts that the sponsor has provided some support financially to the applicant after they were married.
17. The sponsor told the Tribunal that the applicant runs a family printing business from her home. The sponsor said that he did not know the applicants income or whether she had any savings because he was too embarrassed to ask. He further stated that the applicant's income was a private matter. The applicant told the Tribunal that she does not care whether the sponsor has any savings. The Tribunal finds the parties have little knowledge of each other's financial resources.
18. The sponsor said that when he visited the applicant in Vietnam that he paid for the day-to-day living expenses and the applicant paid for their hotel accommodation. The applicant told the tribunal that the sponsor paid for everything when he was in Vietnam.
19. The Tribunal is mindful that the sponsor and applicant were inconsistent with their evidence during the hearing on a number of occasions and this led the Tribunal to question the applicant and sponsor's credibility. These were discussed with the applicant in accordance with s.359AA of the Act. The Tribunal informed the applicant that it wished to put new

information that it would consider being the reason or part of the reason for affirming the decision. The Tribunal explained the relevance and the consequences of the information to the applicant and invited the applicant to comment on or to respond to the information. The Tribunal told the sponsor that he may respond to the information orally or in writing. The sponsor was also informed that he may seek additional time to comment on or respond to the information. The applicant responded orally.

20. The Tribunal put to the sponsor the inconsistencies in evidence in regards to the financial aspects of their relationship. The Tribunal put to the sponsor:
 - That in evidence he had told the Tribunal that he paid for the day-to-day living expenses and the applicant paid for the hotel accommodation when he visited her in Vietnam.
 - That the applicant in evidence stated that the sponsor paid for everything including the hotel bills.
21. The sponsor in response stated that both he and the applicant withdrew money from the ATM and it is not an important thing to get stuck on, it's about the love. The Tribunal does not accept the sponsor's evidence as credible when responding to the inconsistent evidence given by the parties as to who paid for individual expenses when the parties were together in Vietnam.
22. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share the day-to-day living expenses or pool their financial resources.
23. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds based on the evidence before it that the financial aspects of the relationship between the applicant and sponsor are not indicative of being in a genuine and continuing marital relationship.
24. ***Nature of the household***
25. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
26. The sponsor told the Tribunal that he travelled to Vietnam to meet the applicant and met her for the first time at the airport on 25 February 2016. The parties stated that they had a wedding ceremony on 27 February 2016 in Vietnam. The parties stated that they resided together at the Ha Vy Hotel in Ho Chi Minh City for the period 25 February 2016 to 30 March 2016 and provided as evidence a copy of the hotel bill. The applicant said that she spent most of her time with the applicant after 27 February 2016. She further stated that the parties went out together as husband and wife. The sponsor told the Tribunal that the applicant did not stay with him at the hotel all the time and that she left him on his own for two to three hours each day when the applicant went to help her family with the family printing business. The sponsor further stated other than leaving each day that the applicant was very considerate of him. The Tribunal accepts that the parties were in each other's company during this period but the parties provided no other supporting evidence that indicates that the parties shared the responsibilities of the household such as payment of utilities or shared responsibility for housework. The Tribunal finds that short-term stays at a hotel is not

convincing evidence of a reasonable period to claim that a household and the household responsibilities have been shared.

27. The sponsor told the Tribunal that the applicant's family operate a family printing business and the sponsor does not work set hours. The applicant told the Tribunal she worked set hours 8am to 8pm.
28. The Tribunal is mindful that the sponsor and applicant were inconsistent with their evidence during the hearing on a number of occasions and this led the Tribunal to question the applicant and sponsor's credibility. These were discussed with the applicant in accordance with s.359AA of the Act. The Tribunal put to the applicant:
 - That he had stated that the applicant does not work set hours.
 - The applicant said that she worked set hours from 8am to 8pm.
29. The sponsor responded orally that maybe the sponsor worked these hours before he arrived in Vietnam. The Tribunal is of the view the sponsor has little knowledge of the sponsor's hours of work and does not find his evidence credible.
30. The sponsor told the Tribunal that he had visited the applicant's home address and met the applicant's family but did not stay overnight. The applicant told the Tribunal that she resides with her family in a two storey house and lives with her sister on the first floor. The sponsor told the Tribunal that the applicant lives in a three storey house and lives by herself on the third floor.
31. The Tribunal is mindful that the sponsor and applicant were inconsistent with their evidence during the hearing on a number of occasions and this led the Tribunal to question the applicant and sponsor's credibility. These were discussed with the applicant in accordance with s.359AA of the Act. The Tribunal put to the applicant:
 - That he had described the applicant's residence as a three storey building and the applicant lived on the third floor by herself.
 - That the applicant had told the Tribunal that she lives in a two storey building and lives with her sister on the first floor.
32. The sponsor responded orally that it is the same building and that the applicant sometimes stays with her sister in the same building. The Tribunal is of the view the sponsor has very limited knowledge of the applicant's living arrangements and does not find his evidence credible.
33. The Tribunal accepts the difficulties associated with establishing a joint household and living together for significant periods of time when the parties live in separate countries. The Tribunal based on the evidence before it finds that there is little evidence that supports that the parties have lived together or shared the responsibility of the housework on the occasions that they have been physically together in Vietnam. There are no children of the relationship. The Tribunal places no weight on this aspect of the relationship.
34. ***Social aspects***
35. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.

36. The parties stated that they went shopping, to the beach, church and restaurants with family and friends and travelled when the sponsor visited the applicant in Vietnam. The parties provided limited photos taken with each other, with family and on holidays. The Tribunal accepts that the parties have undertaken some joint social activities and have been in the company of family of the applicant and have travelled together. The parties stated that they held a wedding ceremony in a restaurant in Vietnam and approximately 30 people attended. The parties provided as evidence limited photographs of their wedding ceremony to the Tribunal.
37. The parties provided two statutory declarations from themselves attesting to their relationship with the original visa application. The sponsor also provided a statement from his nephew stating that he has spoken to the applicant on Viber to congratulate the parties on their marriage and that his uncle is lonely and would be happier if he was with his wife. The declaration by the sponsor's nephew gives little insight as to how the parties' relationship evolved and does not give any convincing reasons as to why he believes the relationship is genuine and continuing. The Tribunal places little weight on the statements provided. The parties provided no other evidence of friends or family attesting to their relationship.
38. The sponsor has four children from his previous marriage and he stated that his children do not support his relationship with the applicant 100% and that he has engaged his ex-mother-in-law to convince them. The applicant said that she saw the sponsor's youngest son on Viber and saw the other children briefly but there were internet problems and she only said hello and didn't really talk to them. The Tribunal finds that there is little convincing evidence that the parties represent themselves to other people as being in a genuine and continuing relationship.
39. Overall, on considering the evidence given by the applicant and sponsor the Tribunal does not find that the parties represent themselves as being in a committed spousal relationship or that they are regarded by others as being in a genuine and continuing relationship. The Tribunal accepts that they have planned and undertaken some joint social activities together in Vietnam. The Tribunal places little weight on this aspect of the relationship.

40. Commitment

41. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
42. The parties claim to have been introduced by the applicant's brother-in-law Viet. The sponsor said that he was an acquaintance of Viet and told Viet that he was looking for an Asian woman to be his girlfriend. The parties provided evidence that they started to communicate by email on 8 June 2015. The parties stated that they discussed marriage together on 14 and 22 June 2015 via email and were eventually married on 18 May 2016. The parties told the Tribunal that they first met at the airport in Vietnam on 25 February 2016 and held a wedding ceremony on 27 February 2016 at a restaurant in Vietnam. The parties provided a marriage certificate and the Tribunal accepts that they are legally married. To date, the relationship has lasted nearly three years.
43. The Tribunal has concerns as to the quick inception of the relationship and inconsistencies in the parties' evidence during the hearing. The fact that in evidence the parties said that they first spoke to each other on 8 June 2016 and then discussed marriage on two occasions within the next two weeks on 14 and 22 June 2016 raises concerns for the Tribunal. The

Tribunal finds that discussion of marriage six days after first communicating is not indicative of a genuine relationship developing over a reasonable period of time.

44. The parties stated that they remained in contact via telephone, email and social media such as Viber during times of separation. The Tribunal accepts that the parties have maintained communication during times of separation.
45. The Tribunal asked the sponsor if he had purchased a wedding ring for the applicant and could he describe the ring. The sponsor said that he had purchased an 18 carat gold coloured wedding band and earrings. The applicant told the tribunal that the sponsor had purchased a white gold, silver coloured wedding ring with a 4.5 carat diamond.
46. The Tribunal put to the sponsor the inconsistencies in evidence in regards to the purchase of the wedding ring. These were discussed with the applicant in accordance with s.359AA of the Act. The Tribunal put to the sponsor:
 - That he had said that he had purchased an 18 carat gold coloured wedding band and earrings for the sponsor.
 - That the applicant had told the Tribunal that the sponsor had purchased a white gold, silver coloured wedding ring with a 4.5 carat diamond.
47. The sponsor responded orally and stated that he gave the applicant cash and told her to get herself a diamond ring, and that maybe she changed that. He further stated that he bought the applicant a ring and earrings and that he did not ask her about the description of the ring. He further stated that the inconsistencies in the parties' evidence are trivial issues and the important issue is love and it's not fair separating two people in love.
48. The Tribunal does not find the sponsor's explanation of the inconsistent evidence given by the parties about a significant aspect of the relationship such as the purchase of the wedding ring plausible.
49. The applicant stated that she wished to improve her English and integrate into society in Australia. Further stating that she can't predict the future and will work if possible and understands the sponsor is old. The parties said that they hoped to be re-united so that they can take care of each other and live together for the rest of their lives.
50. Having considered the evidence provided by the parties to the Tribunal and their commitment to each other, the duration of the relationship and based on the evidence before it, the Tribunal finds that the parties draw little degree of companionship and emotional support that is indicative of being in a genuine and continuing spousal relationship. The Tribunal finds that based on the evidence before it the couple have made no long-term plans together or that they view their relationship as a long-term one.

51. Findings

52. Based on the evidence before it the Tribunal finds that there is no convincing evidence to show the parties pooled or shared their financial resources, share the daily expenses or that they have planned a financial future together. The Tribunal finds that there is no evidence of any joint ownership of real estate or other major assets or any joint liabilities or that one person in the relationship owes any legal obligation in respect of the other.
53. There is limited supportive or convincing evidence to show the parties established a joint household or shared the household responsibilities together, or represented themselves as

being in a spousal relationship outside a select group of people. There is little evidence to support that the parties have lived together and shared the responsibility for housework.

54. Based on the evidence before it the Tribunal finds there is little evidence to support that the parties present themselves to the wider community as being married to each other and that friends and acquaintances have a sound knowledge of the nature of the relationship. Based on the evidence the Tribunal finds there is very little supportive evidence before the Tribunal to indicate the relationship is socially recognised outside the parties' immediate family members or select group of friends. The Tribunal accepts on the evidence provided to the Tribunal that the parties have travelled and undertaken some social activities together.
55. The Tribunal accepts that the parties have known each other for nearly three years. Based on the evidence before it the Tribunal finds there is little supportive evidence of them living together or that they draw a degree of companionship or emotional support from each other that is indicative of being in a genuine spousal relationship or that they view their relationship as a long-term one.
56. Overall, having considered all the circumstances of the relationship, the Tribunal finds the weight of evidence does not support a finding the parties are in a genuine and continuing relationship. The Tribunal does not consider the financial, household, or commitment aspects of the parties' relationship are indicative of a couple with a genuine, mutual commitment to a shared life together.
57. Taking the above into account and considering all of the evidence cumulatively and holistically, the Tribunal is not satisfied the applicant and the sponsor have established that they are in a genuine and continuing relationship or have a mutual commitment to a shared life together to the exclusion of all others or that they are not living separately and apart on a permanent basis.
58. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision. There is no information before the Tribunal that the applicant would satisfy any of the alternate criteria for the grant of the visa.
59. Therefore the visa applicant does not meet cl.309.211 or cl.309.221.
60. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

61. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

62.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).